BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RANDOLFO ALANIZ Claimant	)	
V.	)	Docket No. 1,045,557
DILLON COMPANIES, INC. Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

This matter is before the Board on remand from the Kansas Court of Appeals from its July 25, 2014, Memorandum Opinion. The Board heard oral argument on January 21, 2015.

Sally G. Kelsey of Lawrence, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations as set forth in its original Order of April 2, 2013, together with the July 25, 2014, Memorandum Opinion of the Kansas Court of Appeals.

ISSUES

The Kansas Court of Appeals concluded the Board erred in failing to consider Dr. Prostic's opinion related to claimant's functional impairment as there is sufficient evidence Dr. Prostic based his opinion on the Fourth Edition of the AMA *Guides*.[1] Further, the Court of Appeals agreed with both the ALJ and dissenting members of the Board that claimant's psychiatric hospitalization was related to the work injury based on the evidence. Therefore, the Court of Appeals remanded this case to the Board with directions to consider Dr. Prostic's independent medical evaluation (IME) in determining claimant's disability and to order respondent to pay claimant's psychiatric hospitalization expenses.

---

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Respondent argues claimant sustained a scheduled injury to the shoulder regardless of Dr. Prostic's opinions, as the more credible medical evidence was provided by Dr. Bieri. Alternatively, respondent maintains the record fails to provide appropriate evidence of task loss even should claimant be found to have suffered a compensable injury to the body as a whole. Further, respondent argues any possible award of work disability should be reduced by $17.93 per week for a retirement benefit offset.

Claimant contends the ALJ's Order dated October 18, 2012, should be affirmed. Claimant argues the assessment of Dr. Prostic is more persuasive than that of Dr. Bieri and should be considered. Further, even should the Board find Dr. Bieri's rating more persuasive, claimant maintains he sustained his burden of proving the 2009 accident increased his permanent disability and such disability was the cause of a 52.6 percent task loss. Claimant contends the ALJ correctly applied respondent's retirement benefit credit.

The issues for the Board's review are:

1. What is the nature and extent of claimant's disability?

2. Did the ALJ properly apply the retirement benefit offset?

FINDINGS OF FACT

The Board adopts the factual and procedural overview set forth by the Court of Appeals and the Board's findings of fact as written in the Board's Order of April 2, 2013. This matter was originally before the Board on respondent's appeal of the October 12, 2012, Award of Administrative Law Judge (ALJ) Brad E. Avery. In its Order of April 2, 2013, the Board disagreed with the ALJ and determined claimant did not suffer any new whole body impairment as the result of his accident. The Board gave no weight to Dr. Prostic's rating report because the Board found there was no evidence indicating Dr. Prostic utilized the AMA *Guides* (4th Ed.) in reaching his opinion.

The Board explained, "Without considering Dr. Prostic's IME report, there is no showing of a whole body injury related to this injury."[2] Additionally, the Board majority found claimant failed to meet the burden of proving his hospitalization was related to depression directly traceable to the physical injury and reversed the ALJ's order requiring respondent to pay for the treatment.[3] Finally, the Board indicated a retirement benefit reduction under K.S.A. 2008 Supp. 44-501(h) did not apply as claimant is entitled to compensation for a functional impairment pursuant to K.S.A. 44-510d(a)(13).

---

[2] *Alaniz v. Dillon Companies, Inc.*, No. 1,045,557, 2013 WL 1876333 (Kan. WCAB Apr. 2, 2014).

[3] Two Board Members dissented on this issue, adopting the legal analysis provided by ALJ Avery in his Order of October 12, 2012.

The Court of Appeals, in its Memorandum Opinion of July 25, 2014, determined the Board erred in failing to consider Dr. Prostic's functional impairment opinion. The Court of Appeals wrote:

> At the outset, there was sufficient evidence that Dr. Prostic's opinion regarding [claimant's] functional impairment was based on the Fourth Edition of the AMA Guides to merit, at a minimum, the Board's consideration. There are three reasons for our determination.
>
> First, the ALJ's order for the IME, directed to Dr. Prostic and mailed to him, specifically referenced that his examination and recommendations were to be made pursuant to K.S.A. 44-510e(a) which provides, in part, that a functional impairment determination shall be made in accordance with the Fourth Edition of the AMA Guides.
>
> . . .
>
> Second, although Dr. Prostic's report did not identify the particular edition of the AMA Guides he used, his reference to "The Range of Motion Model" and his measurements of the range of motion of [claimant's] cervical spine were, as recognized by the ALJ, generally consistent with the medical standards set forth in the Fourth Edition of the AMA Guides.
>
> . . .
>
> Third, the ALJ's analysis and interpretation of the contents of Dr. Prostic's report make clear that the ALJ determined the doctor's findings were derive from and consistent with specific pages found within the Fourth Edition of the AMA Guides.[4]

In addition, the Court of Appeals found the evidence of record proves the required nexus between claimant's psychological condition and his physical work-related injury. Specifically, the Court of Appeals indicated:

> Having carefully considered the entire record, we conclude the Board's decision denying an award of expenses is undermined by [claimant's] testimony, the fact of Dr. Hendler's referral, and the general corroboration provided by Dr. Bieri's medical opinion. . . . The Board's contrary finding denying payment was not supported to the appropriate standard of proof by substantial evidence. [Citations omitted.] Upon remand, these expenses should be ordered paid by [respondent].[5]

---

[4] *Alaniz v. Dillon Companies, Inc.*, No. 109,784, slip op. at 12, (Kansas Court of Appeals unpublished opinion filed July 25, 2014).

[5] *Id.*, slip op. at 18-19.

The Court of Appeals concluded the remaining issues raised by claimant on appeal were moot, given its holdings.

ANAYLSIS AND PRINCIPLES OF LAW

1. What is the nature and extent of claimant's disability?

a. Functional Impairment

Using the AMA *Guides*, Dr. Stull rated claimant as having a 2 percent permanent partial impairment to the left upper extremity, which would correspond to a 1 percent whole person impairment. Dr. Prostic assessed a new impairment to the left shoulder of 15 percent, which equals a 9 percent whole person impairment. Utilizing the Combined Value Chart contained in the AMA *Guides*, claimant suffers a 10 percent whole person impairment as a result of his left shoulder injury.

Regarding cervical impairment, Dr. Bieri opined claimant suffered no additional impairment to the cervical spine as a result of his work-related injury. Dr. Prostic opined claimant suffered a 10 percent whole person impairment to the cervical spine as a result of his work-related injury. The Court of Appeals has directed the Board to consider Dr. Prostic's opinion. The Board gives equal weight to both opinions and finds claimant suffers a new 5 percent functional impairment of the whole body resulting from his work-related injury.

Combining the shoulder and cervical spine impairments pursuant to the AMA *Guides* Combined Value Chart, claimant suffers a 15 percent whole person impairment as the result of his work-related injury.

b. Work Disability

The only task loss in evidence was provided by Dr. Bieri. Dr. Bieri opined claimant suffers a 48 percent task loss arising from his work-related injury. Respondent argues claimant is not entitled to a task loss because his permanent restrictions are due primarily to his scheduled shoulder injury, not the neck injury. In *Daulton v. State of Kansas*,[6] the Board found this argument to be without merit when an injury results in an injury to a scheduled member and nonscheduled portion of the body. In *Daulton*, the Board wrote:

> As a result of her last accidental injury on August 19, 2007, claimant injured her neck and left upper extremity. Both Drs. Gilbert and Prostic provided permanent impairment ratings for claimant's nonscheduled portion of the body (cervical spine) and to scheduled members (left upper extremity). Consequently, claimant is entitled

[6] *Daulton v. State of Kansas*, No. 1,038,284, 2011 WL 800421 (Kan. WCAB Feb. 28, 2011).

> to compen-sation pursuant to K.S.A. 44-510e. Likewise the restrictions imposed as a result of the injuries, whether for the scheduled member or the nonscheduled portion of the body, would also be combined and utilized to determine the task loss pursuant to K.S.A. 44-510e.[7]

Dr. Bieri's task loss opinion is uncontroverted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.[8] Claimant suffers a 48 percent task loss arising from his work-related injury.

Claimant has not worked since his employment was terminated by respondent on December 17, 2011. Under *Bergstrom v. Spears Mfg. Co.*,[9] claimant suffers a 100 percent wage loss. Averaging claimant's 100 percent wage loss with his 48 percent task loss results in a 74 percent work disability.

2. Did the ALJ properly apply the retirement benefit offset?

K.S.A. 44-501(h) states:

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less **any portion of any such retirement benefit**, other than retirement benefits under the federal social security act, that is **attributable to payments or contributions made by the employee**, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

Claimant received two lump sum retirement payouts. The first was an RSA plan from which claimant received a lump sum of $9,838.59. Claimant's contribution to this retirement account was 56 percent. Respondent contributed 44 percent, or $4,328.98. The second lump sum retirement payment was from a profit sharing plan that paid claimant $17,739.54. Respondent's contribution to this plan was 100 percent. Respondent's total contribution to both retirement plans was $22,068.52.

---

[7] *Id.* at 6.

[8] See *Anderson v. Kinsley Sand & Gravel*, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

[9] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

The Board has held that a claimant's retirement benefits are intended to last a lifetime.[10] Consequently, the lump sum should be converted to a weekly equivalent amount by dividing the lump sum amount by claimant's estimated life expectancy.[11] The parties filed a stipulation stating claimant's retirement payments as outlined above. The parties also stipulated claimant's life expectancy is 1,231.36 weeks. The amount of the employer's contribution to claimant's retirement benefits divided by 1,231.36 weeks equals an offset of claimant's weekly workers compensation benefit of $17.92 per week.

CONCLUSION

Based upon the evidence, claimant has a 74 percent work disability beginning December 18, 2011. Respondent is entitled to an offset of claimant's weekly workers compensation benefit of $17.92 per week.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 18, 2012, is modified.

Claimant is entitled to 6.00 weeks of temporary total disability compensation at the rate of $500.67 per week or $3,004.02, followed by 62.25 weeks of permanent partial disability compensation at the rate of $500.67 per week or $31,166.71 for a 15 percent functional impairment, followed by permanent partial disability compensation at the rate of $529.00 per week not to exceed $100,000.00 for a 74 percent work disability.

As of March 9, 2015, there would be due and owing to the claimant 6.00 weeks of temporary total disability compensation at the rate of $500.67 per week in the sum of $3,004.02, plus 62.25 weeks of permanent partial disability compensation for functional impairment and work disability at the rate of $500.67 per week in the sum of $31,166.71, plus 34.14 weeks of permanent partial disability compensation at the rate of $511.08 per week ($529.00 less $17.92 per week), in the sum of $17,448.27 for a total due and owing of $51,619.00, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $48,381.00 shall be paid at the rate of $511.08 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

---

[10] See *Roles v. The Boeing Company*, No. 270,077, 2007 WL 1390690 (Kan. WCAB Apr. 30, 2007).

[11] See *Lleras v. Via Christi Regional Medical Center*, No. 5,008,471, 2005 WL 3665502 (Kan. WCAB Dec. 22, 2005).

Dated this _____ day of March, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

CONCURRING OPINION

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[12] The trier of fact must decide which testimony is more accurate and credible and adjust medical, lay and other testimony that may be relevant to the question of disability. The trier of fact is "free to consider all of the evidence and decide for itself the percentage of disability. The numbers testified to by the physicians are not absolutely controlling."[13]

Based on the medical and lay evidence, I agree with Board Members Arnhold and Terrill that claimant's new impairment is between the opinions of the court-ordered and neutral physician, Dr. Prostic, and Dr. Bieri, claimant's hired medical expert. Giving equal weight to Dr. Prostic's opinion that claimant had a "new" 10% whole body impairment for his cervical spine and Dr. Bieri's opinion of no new impairment results in claimant having a new 5% whole body impairment on account of his 2009 accidental injury. I also agree with the majority's other conclusions.

I write separately to address the dissent's concern that Dr. Bieri is more credible than Dr. Prostic.

Dr. Bieri had opportunities to evaluate claimant in 2006 (before his 2009 accidental injury) and in 2010 and 2012 (after the 2009 accidental injury). Dr. Bieri opined in 2006 that claimant had a 5% impairment based on DRE Cervicothoracic Category II. Dr. Bieri also provided claimant the same 5% impairment based on DRE Cervicothoracic Category II after evaluating claimant in 2010 and 2012. Based on this information, the dissent has a straightforward argument: Dr. Bieri concluded claimant had a 5% impairment in 2006 and a 5% impairment in 2010, so there is no new impairment.

---

[12] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[13] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, Syl. ¶ 1, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

There is value in believing that a physician who evaluates a claimant before and after an accident is in the best position to evaluate whether a new accidental injury resulted in new impairment. However, such position is not inviolate. When considering Dr. Prostic's neutral opinion and the facts of this case, Dr. Bieri's opinion does not convince me that claimant sustained no additional whole body impairment related to his neck.

This is an unusual case because claimant is arguing his own hired expert is not credible. Dr. Bieri's opinion is not very reliable because at the time he gave a 5% rating for claimant's 2009 neck injury, he was completely unaware that he previously gave claimant a 5% rating for his 2005 neck injury. This is not a situation where Dr. Bieri carefully reviewed all of the medical records and concluded claimant had no new impairment. Instead, Dr. Bieri was wholly unaware of his 2006 report until it was presented to him at his 2012 deposition:

> Q. Doctor, in addition to having seen Mr. Alaniz in 2010 and in 2012 at the request of Ms. Kelsey, you had seen him before that, hadn't you?
>
> A. Before 2010?
>
> Q. Yes, sir.
>
> A. I don't remember.
>
> . . .
>
> Q. Doctor, let me show you what's been marked Bieri Deposition Exhibit No. 4.
>
> A. Yes.
>
> Q. If you would take a minute to look at that. Just from the first page, what is that?
>
> A. I've never seen this. This is a report by me generated April 12 th of 2006 to Ms. Kelsey regarding Randolp Alaniz.
>
> . . .
>
> A. . . . I was unaware of my previous evaluation.[14]

[14] Bieri Depo. at 24, 32.

The *Guides* make it clear that estimating impairment is best done when all relevant medical records are reviewed for an informed decision.[15] Dr. Bieri did not make an informed decision; he was ignorant as to his own prior rating. Claimant should not be rewarded for his expert's failure, but it is difficult for this Board Member to elevate the opinion of an expert who is unaware of a prior rating over the opinion of a neutral expert who is actually aware of the pertinent facts and claimant's history, as was Dr. Prostic.

Unlike Dr. Bieri, Dr. Prostic, made an informed decision. Dr. Prostic conducted an examination, reviewed medical records from many medical professionals (showing considerable left shoulder and neck treatment without improvement) and took a history from claimant. Dr. Prostic knew claimant's 2005 accidental injury was a cervical strain that caused claimant only slight tenderness and slight restriction of motion, and further that claimant returned to work without restrictions. Dr. Prostic knew claimant did well until his 2009 accident. Dr. Prostic, unlike Dr. Bieri, knew Dr. Bieri gave claimant a 5% cervicothoracic rating in 2006.

I similarly disagree with the dissent's statement that Dr. Prostic would need to know claimant's prior cervical range of motion in order to assess new impairment.[16] Physicians routinely assign impairment ratings without "certain" knowledge of a claimant's prior history. Here, Dr. Prostic had the benefit of reviewing claimant's prior medical records, including Dr. Bieri's 2006 report, which only noted claimant had "slightly decreased"[17] active range of motion of the neck with respect to flexion and extension with brief, palpable muscle spasm and guarding. This "finding" does not seem very significant. In Dr. Bieri's 2010 report, unlike the 2006 report, specific and significant cervical range of motion figures are provided. Claimant now, according to Dr. Bieri, has moderate cervicothoracic range of motion deficit. When it comes to physiologic deficits, "moderate" is worse than "slight."[18]

Dr. Prostic's own cervical spine measurements, even according to respondent's brief, warrant cervical impairment. There is no evidence claimant had any actual impairment based on decreased cervical spine range of motion prior to his 2009 accident.

---

[15] *Guides* at 10 (Apportionment of impairment requires "accurate information and data on both impairments.") and *Guides* at 101 ("[R]eview all of the pertinent records.").

[16] To my knowledge, the *Guides* do not require proof of what an employee's range of motion was before a work injury. Taken to an extreme, if an injured worker has a post-injury MRI showing a herniated lumbar disk and a positive EMG confirming lumbar radiculopathy, the dissent would require the worker to also come forth with a pre-injury MRI and a pre-injury EMG to prove a change in condition to justify any new impairment. This is an impractical approach. Such information is rarely available.

[17] Bieri Depo., Ex. 4 at 4.

[18] Admittedly, Dr. Bieri testified he could not rate claimant using the Range of Motion Model because claimant's range of motion measurements were non-uniform. However, there is no evidence Dr. Prostic's measurements of claimant's range of motion were invalid.

The burden of proving preexisting impairment is on respondent.[19] It is also worth noting it is the dissenting Board Members, not respondent, who argue claimant or Dr. Prostic must somehow prove claimant's preexisting range of motion deficit before issuing a new rating.

Moreover, even apart from the worsened cervical spine range of motion, claimant's neck was worse after his 2009 accident than before.

For the 2005 injury, Dr. Bieri's 2006 report states claimant did not have significant radiation of pain, numbness or tingling from his neck into his arms. Claimant did not have visible or palpable muscle spasm at rest. He had slight tenderness to palpation. Claimant was not given work restrictions. According to Dr. Bieri, claimant only had conservative treatment for his prior injury.

For the 2009 injury, claimant had more extensive treatment than what was needed for his 2005 injury. The 2009 injury resulted in claimant having epidural steroid injections to the cervicothoracic spine and left shoulder surgery. Dr. Bieri's 2012 report noted claimant had "marked neck pain, radiating into the left shoulder."[20] Claimant also had moderate non-uniform loss of active range of motion of the cervicothoracic spine, accompanied by brief palpable muscle spasm and guarding at the extremes of all range of motion. Claimant was provided permanent work restrictions, including medium restrictions for his neck.[21] Similarly, Dr. Prostic also gave claimant medium level restrictions. Dr. Bieri opined claimant now needs continued pain management.

The differences between Dr. Bieri's 2006 report and his 2010 and 2012 reports are significant. While Dr. Bieri testified the DRE Category he would place claimant into would nonetheless not change,[22] Dr. Prostic, the court-ordered physician, whose opinion we are obliged to consider, indicated claimant had increased cervical spine impairment using a

---

[19] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 96, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[20] Bieri Depo., Ex. 2 at 1.

[21] Bieri Depo., pp. 32-33 ("Even though the impairment theoretically would not change, I think restrictions because of the history and additional treatment in the form of epidural block injections would justify restrictions at least in a medium physical demand level, that's correct.").

[22] The DRE or the Injury Model uses a "one size fits all" approach. For a cervicothoracic injury, Category II allows a 5% impairment and Category III allows a 15% impairment. According to Dr. Bieri, unless claimant has radiculopathy, he has a 5% rating, not a 15% rating. (Bieri Depo. at 30-31). The Injury Model permits no middle ground; a worker fits into one category or the other. However, *Tovar* allows the Board latitude in determining impairment. We are also are obliged to account for Dr. Prostic's court-ordered opinion.

different methodology allowed under the *Guides*, the Range of Motion Method.[23] This Board Member is convinced claimant currently has a higher cervical spine impairment than what he had in 2006, and agrees claimant's 2009 accidental injury resulted in a new 5% permanent impairment involving his neck, a new 10% whole body impairment concerning his left shoulder and a new 74% work disability.

_____
BOARD MEMBER

DISSENT

The undersigned dissent from the majority's decision to give equal weight to Dr. Prostic's impairment rating. The Court of Appeals remanded this case to the Board with directions to consider Dr. Prostic's IME in determining claimant's disability. In the Board's original Order, Dr. Prostic's IME was in fact considered and given no weight for good reason. First, there is no evidence in the record to support a conclusion Dr. Prostic utilized the AMA *Guides* (4th Ed.), as required by K.S.A. 2008 Supp. 44-510e(a). The Court of Appeals assumed evidence not contained in the record to conclude that Dr. Prostic somehow knew K.S.A. 2008 Supp. 44-510e(a) required him to use the AMA *Guides* (4th Ed.).

Second, Dr. Prostic's 10 percent impairment rating to the cervical spine includes all of claimant's current range of motion loss, without any reduction for claimant's pre-injury range of motion loss. Dr. Bieri recorded in his 2006 report claimant had at least some range of motion loss. There is no indication in his report that Dr. Prostic knew with any reasonable probability the extent of claimant's preexisting range of motion loss. Without knowing the extent of pre-injury range of motion loss and applying a credit for that loss, Dr. Prostic's opinion that claimant's current range of motion is due entirely to the 2009 injury lacks foundation and should be given no weight.

---

[23] The *Guides* indicate a physician "should" use the Injury Model (the DRE categories) instead of the Range of Motion Model, but the *Guides* do not make the DRE method mandatory in lieu of the Range of Motion Model. (*Guides* at 94; see also *Bearce v. United Methodist Homes*, No. 97,879, 2007 WL 4105377 (Kansas Court of Appeals unpublished opinion filed Nov. 16, 2007) ("With regard to [Dr.] Quick's use of the range of motion methodology in her evaluation, Bearce argues that Quick's findings are unreliable because the AMA *Guides* to the Evaluation of Permanent Impairment encourage the use of the DRE model for conditions such as those at issue here. Quick's use of the range of motion methodology does not render her rating opinion unworthy of consideration.")).The *Guides* further state the "Range of Motion Model should be used only if the Injury Model is not applicable, or if more clinical data on the spine are needed to categorize the individual's spine impairment." (*Guides* at 112). In this case, we do not know Dr. Prostic's rationale for using the Range of Motion Model, but it is inappropriate to speculate he used the *Guides* improperly.

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[24] Having examined the claimant before and after the 2009 injury, Dr. Bieri was in a better position to testify regarding an increase in claimant's impairment. As such, the preponderance of the credible evidence in the record supports a finding claimant did not suffer an increased impairment to the cervical spine resulting from his 2009 accident.

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Sally G. Kelsey, Attorney for Claimant
strolelawclerk@gmail.com
marcy.kelseylaw@gmail.com

Edward D. Heath, Jr., Attorney for Self-Insured Respondent
heathlaw@swbell.net

Brad E. Avery, Administrative Law Judge

[24] K.S.A. 2008 Supp. 44-508(g).